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Comments On The Reporting Requirements On Responsible Investment In Burma

University of Chicago Law School - International Human Rights Clinic

THE INTERNATIONAL HUMAN RIGHTS CLINIC
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COMMENTS ON THE REPORTING REQUIREMENTS ON RESPONSIBLE INVESTMENT IN BURMA JANUARY 25, 2016

The International Human Rights Clinic at the Mandel Legal Aid Clinic of the University of Chicago Law School is pleased to submit a public comment regarding the *Reporting Requirements on Responsible Investment in Burma,* OMB No. 1405-0209, (hereinafter "Reporting Requirements"). We thank the State Department for giving us the opportunity to submit this public comment.

Executive Summary

We believe the State Department's Reporting Requirements are critical to monitoring and reducing U.S. involvement in human rights violations in Burma. However, we are concerned that these Requirements have fallen short of effectively meeting these goals. Many U.S. corporate investors are failing to comply with the Requirements and their stated objectives, some key investors declining to submit reports at all. The Requirements themselves are too vague, lacking clarity as to the information they seek, and too narrow, seemingly excluding pertinent areas of investor activities. Thus, even when investors do technically comply, their reports rarely yield useful information. In light of ongoing human rights and corruption concerns in Burma, we propose the State Department amend the Reporting Requirements to maximize their efficacy by:

1. Issuing clear and specific reporting guidelines that -
    a. define[1] what constitutes "due diligence policies and procedures that

[1] The *OECD Guidelines For Multinational Enterprises,* ¶ 44-46 (2011), *available*

address operational impacts on human rights, workers rights…”;[2]

b. require information regarding compliance mechanisms within the investor’s operations, subsidiaries, subcontractors and business partners;[3] and

c. provide instructions and model responses on adequate and inadequate reporting.

2. Requiring investors to disclose the identities of related business entities in Burma, including subcontractors, suppliers and business partners.

3. Requiring reports from key investment industries, such as international garment and footwear brands sourcing products, and issuing notice letters to investors failing to comply.

Introduction

The Reporting Requirements are intended to support U.S. government efforts to ensure newly authorized American investment in Burma does not contribute to ongoing human rights violations–one of the key concerns that justifies the current national emergency declared with respect to Burma.[4] The risk

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at http://www.oecd.org/corporate/mne/48004323.pdf, referred to in the Reporting Requirements provide a useful starting point for this definition. The Guidelines recommend, for example, that policies: be written and publically available; define human rights expectations of personnel, business partners and other parties; and be approved by senior executives in the enterprise. Similarly, the ILO has issued numerous standards that provide guidelines on the breadth of topics policies should cover, such as elimination of all forms of forced or compulsory labor, effective abolition of child labor, equality of opportunity and treatment, freedom of association, right to collective bargaining, minimum wages and compensation standards, and workplace safety.

[2] Office of Mgmt. & Budget, No. 1405-0209, 3, § 5(a).

[3] Again, *OECD Guidelines For Multinational Enterprises*, *supra* note 1, provide a useful starting point. As recommended, reports should be required to explain how the policy has been embedded in corporate operations and what procedures are in place to ensure policies are complied with both internally and by business partners, including detailed descriptions of any compliance systems, internal controls, and auditing and accountability mechanisms.

[4] *See 60-Day Notice of Proposed Information Collection: Reporting Requirements for Responsible Investment in Burma*, 80 Fed. Reg. 4 (Nov. 25, 2015) *available at*

that U.S. investment could undermine rather than support the promotion of human rights in Burma continues to be as true today as it was when the Reporting Requirements were formulated.[5] Child labor and land grabbing without proper due process are still major concerns.[6] The rule of law remains weak and violators of human rights are seldom held accountable for their conduct.[7] The Reporting Requirements provide increased transparency in U.S. investor operations in Burma, which is a linchpin in efforts to determine whether American investments align with U.S. foreign policy interests.[8] The Reporting Requirements also facilitate independent efforts by civil society to monitor potential human rights concerns in U.S. investor operations.[9]

Yet, there are lingering gaps between the general quality of reports submitted and the objectives of the Reporting Requirements. Many reports do little to provide transparency on company practices implicating these and other serious human rights issues. Various others provide little to no information on how due diligence procedures aimed at mitigating potential adverse human rights

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https://www.federalregister.gov/articles/2015/11/25/2015-30054/60-day-notice-of-proposed-information-collection-reporting-requirements-for-responsible-investment.

[5] "In the past, foreign investment in Burma has been linked to human rights abuses." *See id.* at p. 5.

[6] International Trade Union Confederation, *Foreign Direct Investment in Myanmar: What Impact on human Rights?* 7-8 (2015), *available at* http://www.ituc-csi.org/IMG/pdf/ituc-burma.pdf.

[7] *Id.* at 30.

[8] The Reporting Requirements are intended to support the U.S. foreign policy goal of "improving human rights protections and facilitating political reform in Burma." *See supra* note 5 at p. 4-5.

[9] *See* uscampaignforburma.org, *Report Card: U.S Companies Investing in Burma*, 6 (2014), *available at* http://www.uscampaignforburma.org/images/USCB_Report_Card_US_Companies_Investing_In_Burma.pdf.

impacts are implemented in practice. Some do not disclose the identity of local vendors or business partners to which reported company policies apply. The manner or extent to which investors enforce or monitor whether related business entities comply with the investor's reported due diligence procedures are likewise seldom disclosed. These omissions make it particularly difficult to accurately assess the adverse human rights impact of American investment in Burma.

Worse still, some investors, particularly international garment and footwear brands sourcing production from third party Burmese factories, have contended that they do not need to report at all. This contention to date has not been addressed by the State Department. Garment manufacturing stands to be a major source of U.S. investment in Burma[10]. As has been extensively reported, garment-manufacturing industries in the region are commonly associated with working conditions that violate human rights standards.[11]

We believe the issues identified above go beyond mere investor non-compliance with the Reporting Requirements. As written, the Requirements do

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[10] International Trade Union Confederation, *Foreign Direct Investment in Myanmar: What Impact on human Rights?*, 7 (2015), *available at* http://www.ituc-csi.org/IMG/pdf/ituc-burma.pdf

[11] *See, e.g.*, Human Rights Watch, *Whoever Raises Their Head Suffers the Most: Workers' Rights in Bangladesh's Garment Factories* (2015), *available at* http://features.hrw.org/features/HRW_2015_reports/Bangladesh_Garment_Factories/index.html; *See also* Andrew Biraj, *Millions of Bangladesh garment workers still face unsafe conditions*, Reuters (Dec. 17, 2015), *available at* http://uk.reuters.com/article/uk-bangladesh-garments-idUKKBN0U01SP20151217; *See also* Patrick Winn, *The slave labor behind your favorite clothing brands: Gap, H&M and more exposed*, Salon (Mar. 22, 2015), *available at* http://www.salon.com/2015/03/22/the_slave_labor_behind_your_favorite_clothing_brands_gap_hm_and_more_exposed_partner/.

not require disclosure of information critical to assess the human rights impact of U.S. investors in Burma. They lack guidance as to what constitutes a minimally adequate disclosure, as well as clarity as to whether certain transactions amount to investments. To the extent that international garment and footwear brands are not required to report, the Reporting Requirements are insufficiently comprehensive. For these reasons, and those explained below, we believe the Reporting Requirements should undergo significant revisions.

Towards this end, these comments will address three major challenges with the current Reporting Requirements: (1) lack of clear definitions and guidelines on the expected content of investor reports; (2) failure to require investors to identify local business partners; and (3) lack of clarity as to whether key industries, such as the footwear and garment industry, are required to issue reports. We will discuss each challenge in turn and make recommendations to address them in the final section.

Discussion

1. The Requirements Should Contain Clear and Specific Guidelines on the Information to Be Reported.

a. *The Requirements should delineate expected content of investor reports and contain working definitions of key terms.*

As written, some of the most important questions the Reporting Requirements ask investors to answer are vague and excessively broad. Broad questions result in broad answers that, while in technical compliance, do not ultimately promote the stated objectives of the Reporting Requirements. Particularly, much information needed to produce transparent and useful reports that would assist the State Department, NGOs, and other investors and local firms in promoting and protecting the human rights of workers in Burma is not required by the current Reporting Requirements.

Investors, while required to report on human rights due diligence procedures under Sections 5a to 5e of the Reporting Requirements, are not provided with a working definition of what constitutes human rights due diligence procedures and are not required to disclose the extent to which these policies are implemented within the company. The Requirements merely state that investors should provide a "concise summary or copies of the following policies and procedures"[12] including "due diligence polices and procedures (including those related to risk and impact assessments) that address operational impacts on human rights…."[13] While the general reference to the *OECD Guidelines For Multinational Enterprises*[14] is helpful, it does not substitute for a definition of what kinds of policies investors should have in place. The generality of this Requirement, which leaves ample room for investor interpretation, creates a heightened risk that an investor is adversely affecting human rights on the ground without being required to report on it. Similarly, not adequately reporting on the implementation of due diligence procedures may result in due diligence procedures that, while sounding good on paper, are ineffective in addressing human rights violations and thus unhelpful as a model to other investors or local firms.

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[12] *See supra* note 2.
[13] *Id*.
[14] *Id*. at 3 n2.

Notably, the few specific questions and answers required by the Reporting Requirements have resulted in monitoring organizations identifying misrepresentations by investors on issues such as the locations of investors' operations. For example, in a report filed in 2013, Hercules Offshore, Inc. allegedly omitted from its report off-shore locations in which it operated.[15] As a result, monitoring NGOs, in this case the U.S. Campaign for Burma (USCB), were able to point to a clear violation of the Reporting Requirements and publicly request that appropriate disclosure be made. Because investors are specifically required to disclose all the locations in which they operate, monitoring NGOs are in a better position to both require more complete information, as well as to hold non-complying investors accountable for failing to comply with the Requirements. Revising the Reporting Requirements to provide working definitions and guidance to investors on the information sought would likewise improve the efficacy of the mechanism in achieving its stated goal of inducing transparency among investors.

b. ***The Reporting Requirements should call for disclosure of compliance mechanisms within the investor's operations, including subsidiaries and subcontractors, and by business partners.***

The Reporting Requirements should also require investors to disclose what mechanisms are used to monitor compliance within their own operations and related business entities. Currently, investors are merely required to disclose the extent to which these policies are "required" of their business partners, but not on

[15] *See supra* note 9.

how or whether they are enforced or how or whether the investor monitors enforcement. [16] A large number of reports submitted by investors, such as the reports submitted by Clipper Holdings LTD ("Clipper"),[17] Colgate Palmolive Company,[18] Richard Wynn Naing Co. Development Group, LTD.[19] and by Four Rivers,[20] have collectively stated that their due diligence procedures are "communicated" or "expected" of related business entities. Little to no information was provided in these reports on how or whether these policies are enforced or monitored in practice. The report submitted by Western Union Company or Aberdeen Asset Management Inc.,[21] for example, did not even go as far as stating whether due diligence policies under section 5a to 5e apply to

[16] *See supra* note 2.
[17] Christopher Ladd Heffner, *U.S Government Annual Report For Responsible Investment in Burma Clipper Holdings Incorporated,* 8 (May 8, 2014), *available at* http://photos.state.gov/libraries/burma/895/pdf/ClipperHoldingsPublicReport.pdf.
[18] John Shin, *Report on Responsible Investment in Burma,* (April 1, 2015), *available at* http://photos.state.gov/libraries/burma/895/pdf/ColgatePalmolive_ResponsibleInvestment_in_Myanmar.pdf.
[19] Richard W. Nalng, *U.S Government Annual Report on Responsible Investment in Burma Richard Wynn Co. Development Group, Ltd. (RWNDG) Public Report*, (September 24, 2015), *available at* *http://photos.state.gov/libraries/burma/895/pdf/RWNDG_ResponsibleInvestmentPublicReport2015.pdf*.
[20] Udayan Chattopadhyay, *Four Rivers, Burma Report on Responsible Investment – Public Report,* 3 (2015), *available at* *http://photos.state.gov/libraries/burma/895/pdf/FR_ResponsibleInvestmentPublicReport2015.pdf*.
[21] Sofia Rosala, *Aberdeen Management Inc. Reporting Requirements for Responsible Investment – Burma (Myanmar) 2015 Annual Public Report*, (June 29, 2015), *available at* *http://photos.state.gov/libraries/burma/895/pdf/20150629AberdeenAssetManagementIncMyanmarPublicReport.pdf*.

related entities.[22] Without this information, an investor report has minimal utility in determining whether or not there are effective mechanisms in place to reduce U.S. company involvement in human rights violations in Burma.

c. *The Reporting Requirements should provide instructions and models of adequate investor reporting.*

As noted above, currently, the State Department Reporting Requirements provide little guidance as to what constitutes an adequate investor report. In contrast, similar disclosure requirements, such as the California Transparency in Supply Chains Act of 2010[23], are accompanied with detailed guidance on what constitutes an appropriate disclosure.[24] The California law requires disclosure of information on due diligence procedures aimed at eradicating human trafficking and slavery from a company's supply chain. In conjunction with the statute, the California Department of Justice has issued a detailed resource guide that expressly distinguishes between adequate and inadequate responses.[25] The guide also provides detailed explanation of information sought under the statute, including examples of what constitutes a model answer, examples of inadequate responses, and commentary distinguishing between sufficient and insufficient responses to questions.[26] These additions provide useful guidance to reporting companies and help set standards for useful reports. The Requirements should

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[22] Jacqueline Molnar, *Western Union: Report on Responsible Investment in Burma,* 3-6 (January 21, 2014), *available at* http://photos.state.gov/libraries/burma/895/pdf/WesternUnionBurmaInvestment.pdf.

[23] West's Ann.Cal.Civ.Code § 1714.43

[24] Kamala. D. Harris, *The California Transparency in Supply Chains Act: A Resource Guide.* California Department of Justice, 9-22, (2015).

[25] *Id.* at 1-20.

[26] *Id.*

provide similar instructions, including: a short description of the type of information sought from the investor, as well as why it is necessary; example of model disclosures for each question; examples of inadequate or overly broad and conclusory responses; and commentary distinguishing between a sufficient and insufficient response for each question.

2. The State Department Should Require Investors to Disclose the Identities of Related Business Entities in Burma, Including Suppliers and Business Partners.

Investors are currently required under Section 5f to identify the "extent to which human rights due diligence procedures apply… to related entities,"[27] but not to disclose who their business partners are, or, as noted above, provide any explanation on how due diligence procedures are applied to their partners. For instance, in the Hercules Offshore, Inc. report cited above, it was stated that the company engaged a Burmese services supplier and that its reported policies under Sections 5 were "communicated" to Hercules Offshore's Burmese Supplier, as required under Section 5f.[28] Missing, however, was a name or any information with which to identify the supplier, making it impossible to confirm or monitor Hercules' activities in Burma. Likewise, in a recent report submitted by Ball Corporation, the investor stated, "all suppliers are expected to perform in accordance with our code of conduct…as appropriate, we will actively support

[27] *See supra* note 2 at § 5(f).

[28] Charles A. Lestage, Hercules Offshore, Inc., *Report on Responsible Investment in Burma*, (July 1, 2013), *available at* http://photos.state.gov/libraries/burma/895/pdf/HerculesOffshoreonBurma.pdf.

them to rectify any issues identified."[29] Conspicuously absent is the identity of the investor to which these policies apply. Without this information it is exceedingly difficult to monitor the veracity of disclosures under Section 5f. Absent a requirement to disclose who the related business entities are, it becomes far more likely that an investor will withhold or misrepresent information required under Section 5f, as there is no way to confirm this information without knowing the identity of local partners. Requiring disclosure of partners would close this substantial loophole and further the objectives of the Requirements by providing the State Department and civil society a tool by which to independently monitor investor compliance with Section 5.

3. The Definition of New Investment Should Be Interpreted to Include International Garment and Footwear Brands Sourcing Production from Third-Party Burmese Factories.

From the perspective of an investor, the extent to which the term "New Investment" under 31 C.F.R. § 537.311 applies to certain investments is unclear. Particularly, it is not clear whether the sourcing of production of garments and other products from third party Burmese factories by international garment and footwear brands– such as the GAP Inc. (GAP) – constitutes a "New Investment" as that term is defined in the Requirements. GAP, which was the first American clothing company to invest in the country following 2013, has contended in its

[29] Janice L. Rodriguez, Ball Corporation, *Responsible Investment in Burma: Ball Corporation* (July 2015), *available at* http://photos.state.gov/libraries/burma/895/pdf/20150701BallCorporationPublicReport.pdf.

report that it is not required to report at all, but is doing so voluntarily.[30] Not requiring clothing companies to report has the potential to significantly discourage transparency among U.S. investors in Burma and weakens the beneficial impact of the reporting mechanism. To avoid this outcome, we propose that the State Department use its discretion to assess compliance with the Reporting Requirements, which by default entails an interpretation of the term "New Investment," to request reporting from international garment and footwear brands. The State Department should follow this interpretative stance with both a public proclamation that it expects reporting from these companies and notice letters to international garment and footwear brands who fail to submit a report.

The ambiguity stems from the distinction made under the definition of the term "New Investment." "New Investment" is defined as "the entry into a contract that includes the economic development of resources located in Burma,"[31] expressly excluding "the entry into a contract to sell or purchase goods. [32] However, the regulations do define the economic development of *human* and *industrial* resources located in Burma as a "New Investment."[33] The definition of "economic resources located in Burma" also expressly incorporates the economic *exploitation* of human and industrial resources located in Burma.[34] Benefitting

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[30] GAP, Inc., *Responsible Sourcing in Myanmar: GAP Inc,* 2 (Aug. 25, 2014), *available at* http://photos.state.gov/libraries/burma/895/pdf/Gap_Inc_Myanmar_Public_Report-8_25_14FINAL.pdf.
[31] *See* 31 C.F.R. § 537.311(a)(1).
[32] *See* 31 C.F.R. § 537.311(b).
[33] Section 537.316 (a) defines "resources located in Burma" as including human resources.
[34] *See* 31 C.F.R § 537.302(a).

from this ambiguity, GAP contends that sourcing production to third-party Burmese factories is more akin to the purchase of goods than the exploitation of human and industrial resources.[35]

However, in reality, garment sourcing is far from a mere transaction for the purchase of goods. Per GAP's own report, the company exercises considerable control over the production process – including audits at factory sites to ensure compliance with the company's code of conduct for their vendors.[36] Clothing companies also likely require specific production methods and quality control procedures from local vendors. At some level, control over the production process makes the transaction appear more like the " economic development of resources," as that term is defined under 31 C.F.R. § 537.302 and § 537.316, which also include the *exploitation* of *human and industrial* resources located in Burma. Thus, for purely definitional reasons, clothing companies sourcing production to third-party factories in Burma should be required to report.

Moreover, the objectives of the Reporting Requirements also necessitate that clothing companies be required to report. GAP's contention that it is not required to report, insofar as it is goes unaddressed, has the potential to significantly reduce the robustness of the Reporting Requirements. Garment manufacturing in Burma stands to become a major source of investment in the near future.[37] To the extent that international garment and footwear brands will adhere to GAP's unaddressed contention and forego reporting, a major source of

[35] *See supra* note 30.
[36] *See supra* note 30 at 3.
[37] *See supra* note 10.

U.S. investment, and more importantly, of potential human rights violations will evade disclosure. To avoid this outcome, the State Department should thus interpret the ambiguity under the definition of the term “New Investment” in favor of disclosure**.**

We recognize that the *enforcement* of the Reporting Requirements is under the purview of Treasury Department and is outside the scope of this document. However, the State Department does play a significant role in assessing *compliance* with the Reporting Requirements. It may do so by sending notice letters to investors that in its view have failed to comply, including failures to report according to its interpretation of what constitutes a “New Investment.” We propose that these efforts be taken in connection with international garment and footwear brands. Notice letters would ensure that international garment and footwear brands are aware that they are expected to submit a report. Issuing a public proclamation on the State Department website would likewise go a long way in ensuring that investors are made aware of the State Department’s interpretive stance. These efforts would, as mentioned above, will result in wider compliance and significantly advance the objectives of the Reporting Requirements.

Recommendations

For the reasons stated above, we make the following recommendations to improve the quality of investor reports and efficacy of the Reporting Requirements:

1. *Revise Reporting Requirements to contain clear and specific guidelines on required information and adequate investor reporting, including*:

    a. Defining Basic Terms and Expected Content of Reports: Defining what constitutes "due diligence policies and procedures that address operational impacts on human rights, workers rights…."[38] The *OECD Guidelines For Multinational Enterprises*, cited in the current Requirements, contain some recommendations that could provide a starting point for a definition, such as *written policies and procedures that are publically available that define the human rights expectations of personnel, subsidiaries, subcontractors and all other local business partners and have been approved by senior executives in the enterprise*.[39] Any working definition should also be specific about the human rights the policies in place should address, the most fundamental of which are the elimination of all forms of forced or compulsory labor, effective abolition of child labor, equality of opportunity and treatment, freedom of association, right to collective bargaining, minimum wages and compensation standards, and workplace safety.

    b. Requiring Information on Compliance Mechanisms Within Operations and for Business Partners: Requiring information regarding monitoring and accountability mechanisms to ensure compliance with policies and procedures within the investor's operations, including subsidiaries and subcontractors and other local business partners.[40] At minimum, investors should explain how the policies and procedures have been embedded in their operations and what procedures are in place to ensure policies are complied with both internally and by business partners, including detailed descriptions of any compliance systems, internal controls, and auditing and accountability mechanisms.

    c. Providing Reporting Guidelines and Model Responses: Providing instructions and model responses on adequate and inadequate reporting, including instructions and detailed description on what

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[38] *See supra* note 2.
[39] *See supra* note 1. Similarly, the ILO has issued numerous standards that provide guidelines on the breadth of topics the policies should cover such as elimination of all forms of forced or compulsory labor, effective abolition of child labor, equality of opportunity and treatment, freedom of association, right to collective bargaining, minimum wages and compensation standards, and workplace safety.
[40] Again, *OECD Guidelines For Multinational Enterprises*, ¶ 44-46, *supra* note 1, provide a useful starting point.

constitutes an adequate, useful report; short description of the type of information sought from the investor in individual questions, as well as why it is necessary; example of model disclosures for each question; examples of inadequate or overly broad and conclusory responses; and commentary distinguishing between a sufficient and insufficient response for each question.

2. *Requiring investors to disclose the identities of related business entities in Burma, including suppliers and business partners.*

3. *Requiring reports from key investment industries, such as international garment and footwear brands sourcing products, and issuing notice letters to investors failing to comply.*

Conclusion

The Reporting Requirements continue to be an important step towards supporting the U.S government efforts to promote the protection of human rights in Burma. However, it is also imperative to recognize and in turn remedy the shortfalls in the current mechanism. In order to maximize the utility of the disclosures, more detailed information from a greater number of investors is needed. The aforementioned revisions, we are confident, will go a long way towards achieving the government's aim. By adopting the revisions, the State Department can ensure that the reporting framework supports the noble foreign-policy objectives in the name of which the Reporting Requirements were adopted in the first place.